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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 671

THOMAS J. FITZGERALD, Trustee in Bankruptcy,
PETITIONER,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, RESPONDENT.

In the Matter of
MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership, consisting of Horace Leon Midyett and Ruel Farries May, Bankrupt.

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Respondent characterizes the question presented by its attempted "amendment" as being merely whether the name of a principal creditor may be inserted in place of the name of the Surety. That is not the problem. It is not merely a question of "names", for the "amendment" sought here also requires a change in legal theory, facts relied on, evidence required, and defenses available.

CHANGE OF CLAIM

As already indicated in the first full paragraph on page 9 of the Petition, Petitioner has no quarrel with the rule of law announced by the authorities cited on page 4 of the Brief in Opposition. It will be seen, however, that what those cases involved was the utilization of a different legal theory *based on the same facts*. Those cases cannot be authority here, for Respondent seeks to introduce by "amendment" a new transaction; i.e., a new set of facts. The facts at first relied upon by the Surety were its payments to the principal creditors of the Bankrupt. The facts it now seeks to introduce and rely upon concern the separate occasions on which workmen, materialmen and subcontractors rendered services and delivered goods to the Bankrupt.

If Respondent means to imply in the last paragraph on page 4 of the Brief in Opposition that the Surety's initial claim was sufficient to comply with Section 57i, he is in error. The facts only support the Surety's claim for indemnity, not the principal creditors' claims for goods and services. For instance, the claim does not even purport to set forth the consideration for the principal creditors' claims, as required by the Act. See *3 Collier on Bankruptcy*, Par. 57.03, p. 125 (14th Ed. 1941). Instead, the Surety relies on the written Indemnity Agreement, a consideration wholly foreign to a claim by subrogation. (R.3).

CONFLICT IN CIRCUITS

Petitioner does not rely on *Glint Factors, Inc. v. Schnapp*, 126 F. 2d 207 (2d Cir. 1942) as being *contra* to the decision below, but merely cites it to show the limits of the rule of liberal amendment.

Respondent attempts to distinguish *Matter of G. L. Miller & Co. Inc.*, 45 F. 2d 115 (2d Cir. 1930) on the ground that the court there said it was unnecessary to consider

whether the surety's amended claim might set forth the names and amounts due to the bankrupt's principal creditors. The *Miller* opinion itself discloses that the *reason* why it was unnecessary so to decide was because the claim which the Surety sought to assert by amendment was not a claim in the name and right of the bankrupt's principal creditors, as the first had been, but rather was a direct claim on an indemnity agreement between the bankrupt and the surety. In the court's own words (45 F. 2d at 116):

> "Under Section 57i of the Bankruptcy Act (11 USCA Sec. 93 (i), if such bondholders failed to prove their claims, the appellant as guarantor of the bonds was entitled to make proof in the names of the bondholders. The original petition set forth neither their names nor the amounts due them. Whether such facts could be added by amendment after expiration of the statutory six months for proving claims, we need not now consider, because the proposed amendment, refusal of which is the sole error assigned, contains no reference to any such indebtedness; nor is any contention presented that appellant should have been permitted to make proof in the right of any guaranteed bondholder.
>
> "The indebtedness asserted in the proposed amendment is based upon a written agreement made in May, 1925, by which the bankrupt agreed to indemnify appellant against expense or liability it might incur by issuing bonds or guaranties at the request of the bankrupt."

Respondent has misinterpreted *In re Boggs-Rice Co. Inc.*, 4 F. Supp. 432, rev'd on other grounds, 66 F. 2d 855 (4th Cir. 1933). There, an endorser of the bankrupt corporation's promissory note filed a claim in his own name. The court correctly pointed out that under Section 57i the endorser might claim in the payee's name if the payee did not. The court further noted (4 F. Supp. at 436):

> "An indorser on a note made by a bankrupt, unless the indorser has paid the note, cannot in his own name file

> a proof of claim. Until the indorser has paid the note, it is the payee who has the provable claim, and the claim of the indorser is contingent."

The significant fact in *Boggs-Rice*, as expressly found by the court, was (4 F. Supp. at 436):

> "That either of these notes has been paid does not appear."

Evidently influenced by the thought that since there was no payment, there could be no indemnity, the court construed the claim as being the same throughout. Thus, there was no ruling that one might change from the claim of the principal creditor (the payee) to a claim of indemnity (as endorser). Since the claim was the same, substituting the name of the payee therein merely corrected what amounted to a clerical error, a situation well within the scope of the rule permitting amendment.

In re Salvator Brewing Co., 193 Fed. 989 (2d Cir. 1912) is not helpful to Respondent as a precedent in this case. It is clear from the opinion of the Circuit Court and from the opinion of the District Court (*In re Salvator Brewing Co.*, 188 Fed. 522, S.D.N.Y. 1911) that no question as to Section 57i was raised. The controversy in the case was entirely on two points; (1) whether one of the endorsers could prove a claim as agent of all, and (2) whether any claim could be filed after one year following the adjudication in bankruptcy. The Circuit Court held affirmatively on the above questions, relying heavily as to the second point on the discretion of the District Judge, and on the ground that the claim was timely under the then provision authorizing a claim within one year of its liquidation by litigation. Because testimony in the former proceedings amounted to a substantial proof of claim (and no question was raised as to whether it was the same claim as later asserted) the allowance of

an amendment was consistent with the rule of *Hutchinson v. Otis, Wilcox & Co.*, 190 U.S. 552, 23 S.Ct. 778 (1903).

Similarly, *Insley v. Garside*, 121 Fed. 699, modified, 123 Fed. 78 (9th Cir. 1903) has little or no precedent value to Respondent. The "new claim" question, as affected by Section 57i was not raised, argued, or discussed in *Insley*. If, however, *Boggs-Rice*, *Salvator Brewing* or *Insley* should be considered consistent with the decision below, it further illustrates and buttresses Petitioner's contention that there is a conflict among the various circuits, and is a question upon which this Court should rule.

The bulk of Respondent's argument has been addressed to the merits of this case. Petitioner's failure to deal at length with every contention, conclusion and implication relating thereto should not be taken as an indication of weakness on the principal point. There is much to be said on Petitioner's behalf, and much to recommend a definitive decision by this Court. Such a decision, however, requires a full hearing, and ought not in effect to be made by letting the matter go by default.

Respectfully submitted,

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